

STATE OF MICHIGAN
IN THE SUPREME COURT
ON APPEAL FROM THE COURT OF APPEALS
Neff, P. J., and Wilder and Cooper, J.J.

CENTRAL CEILING & PARTITION, INC.,

Plaintiff-Appellee,

v.

STATE OF MICHIGAN DEPARTMENT OF
COMMERCE HOMEOWNER CONSTRUCTION
LIEN RECOVERY FUND,

Defendant-Appellant,

and

KITCHEN SUPPLIERS, INC.,

Defendant, Cross and Counter
Plaintiff-Appellee,

and

CAPPY HEATING AND AIR CONDITIONING,
INC.,

Intervenor, Cross-Claimant, Counter-
Claimant and Third Party Plaintiff-
Appellee.

Supreme Court No. 121009

Court of Appeals No. 225378

Wayne County Circuit Court No.
No. 98-810597-CH

APPELLANT'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

Michael A. Cox
Attorney General

Thomas L. Casey (P24215)
Solicitor General
Counsel of Record

Michael A. Lockman (P16748)
Kelley T. McLean (P56542)
Assistant Attorney Generals
Attorneys for Defendant-Appellant
3030 W. Grand Blvd., Ste. 10-200
Detroit, MI 48202
(313) 456-0400

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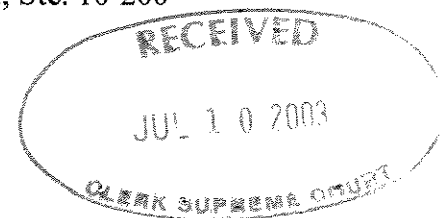


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ARGUMENT

I. The 90-day recording provision is not subject to a liberal interpretation merely because the Wayne County Register of Deeds did not maintain an entry book

The failure of the Wayne County Register of Deeds to maintain an entry book as required by statute does not mean that the substantial compliance provision of the Construction Lien Act (Act) applies to the 90-day recording provision. Contrary to Appellees'¹ contention, the substantial compliance provision of the Act does not apply to provisions, which are clear and unambiguous.

In *Brown Plumbing & Heating v Homeowner Construction Lien Recovery Fund*, 442 Mich 179, 185; 500 NW 2d 733 (1993), this Court stated:

While we acknowledge that the liberal construction of the first sentence [of section 302] applies to the entire act, we nonetheless find that liberality cannot and should not nullify a clear and unambiguous requirement.

Additionally, this Court in *Northern Concrete Pipe, Inc. v Sinacola Companies-Midwest, Inc.*, 461 Mich 316, 323 and 324; 603 NW 2d 257 (1999) noted:

The case before us is a clear instance in which the Legislature could not have imposed a more precise requirement. MCL 570.1111(1)...states without qualification that a subcontractor's right to a lien ceases to exist if not recorded in the county office of the register of deeds within ninety days after the last date of furnishing.

Section 111(1) does not require an analysis of if and why the register of deeds failed to comply with mandatory statutory provisions of the Recording Acts. The omissions of the Wayne County

¹ Appellant's Reply Brief is in response to Appellee's Kitchen Suppliers, Inc.'s, Cappy Heating & Air Conditioning, Inc.'s, and the Amicus Curiae Brief filed by the Michigan Land Title Association. The Plaintiff-Appellee Central Ceiling & Partition, Inc. has not filed a brief as of this date.

Register of Deeds, however, do not alter the plain language of section 111(1).²

The word “record” should not be given a liberal interpretation because the Wayne County Register of Deeds failed to maintain an entry book noting the date, hour, and minute of receipt of Appellees’ claims of lien. While MCL 565.25(1) and (4) provide that an instrument is deemed recorded once it is entered into an entry book noting the date, hour, and minute of receipt³, Appellees’ claims of lien were not recorded on the date of receipt because the Wayne County Register of Deeds did not keep an entry book as required by statute, MCL 565.24. Thus, a record of Appellees’ claims of lien was never made at the time of receipt. Despite this, Amicus Curiae requests that Appellees’ liens should be considered recorded for purposes of perfection on the date they were presented to the Wayne County Register of Deeds, even though the liens were not recorded in an entry book noting the date, hour, and minute of receipt.

However, perfection alone does not satisfy section 111(1) of the Act as the Legislature used the term “record,” not “perfected.” The purpose for recording a claim of lien is not only to provide a means by which a subcontractor can be paid, but to also provide notice. Amicus Curiae’s argument that the liens were perfected upon receipt is far too narrow because it only takes into account the interest of lien claimants and not other parties who have or may have an interest in a particular property. The Legislature, however, recognized that persons, in addition to lien claimants, would be affected by a claim of lien recorded against a property when it enacted the 90-day recording requirement. This Court in *Northern Concrete Pipe* emphasized the interests of parties other than lien claimants when it noted that it would not be equitable to

² In situations where the register of deeds is not performing its statutory duties, a mandamus action can be brought. *James Jones v Department of Corrections*, ___Mich___; ___NW2d___ Case No. 120991 (July 2, 2003). In this case, Appellees chose not to bring a mandamus action against the Wayne County Register of Deeds.

³ It should be noted that the entry books also contain other information as indicated by MCL 565.24.

subject a property owner⁴ to foreclosure when an owner “rel[ied] on the clear and unambiguous requirements of MCL 570.1111(1) and found no notice of [a] lien filed with ... the register of deeds.” *Id.* at 322. In this case, there was no entry book to which parties could look to find Appellees’ liens were received. Rather than recording the liens in an entry book on the date of receipt, the liens were copied into the appropriate books on a liber and page number at a later date. (App 27a). The hour and minute are also noted. (App 18a-26a).

The receipt of an instrument alone does not deem an instrument to be “recorded.” That is because notice is not achieved as contemplated by the Recording Acts,⁵ in particular, MCL 565.25(4). Surely the Legislature did not intend for an instrument such as a claim of lien to be recorded if it is sitting in a pile with no record of it whatsoever. Notice is not accomplished by placing a lien in a stack with other instruments to be recorded. An inquiry and search of the records at the register of deeds would prove futile, as there would be no entry or record of a lien claimant’s interest in a property. If the Legislature had intended for an instrument to be recorded upon receipt, they would not have required the maintenance of an entry book, which is not the case. That is because the purpose of recording a claim of lien is not only to create a lien right,

⁴ While in this case, the owners have been afforded the protection of the Fund since they have complied with MCL 570.1203(1), it is important to note that protection from the Fund is only available in cases where the property is considered a residential structure as defined in MCL 570.1106(3). In all other lien foreclosure actions, where the property is considered commercial or where a house is considered a “spec house”, property owners are not afforded the protection of the Fund.

⁵ A great amount of emphasis has been placed on the importance of recording instruments to provide notice to the general public. While *Sinclair v Slawson*, 44 Mich 123, 127; 6 NW 207 (1880), is factually different from this case in that there was an entry book in which a mortgage was recorded, the Court commented that the purpose of the entry book is to provide a reference to third parties to find an instrument when the actual instrument has not yet been copied in the record book.

but to provide notice to the public who may be affected by the enforcement of liens which are not recorded as contemplated by section 111(1) of the Act and the Recording Acts.⁶

If an entry book is not kept, the question becomes at what point is an instrument deemed recorded. While Amicus argues that the assignment of a liber and page number does not mean a document has been recorded and is meaningless in that an instrument still cannot be located, the assignment of the liber and page number together with a date, hour, and minute was the first step taken by the Wayne County Register of Deeds to make a record of Appellees' liens. Here, based upon the facts in this case, the first record (noting the date, hour, and minute) made of the claims of lien by the Wayne County Register of Deeds was when the liens were recorded in the appropriate record book on a particular liber and page bearing the later date the liens were formally recorded. (App. 27a). This occurred more than 90 days after Appellees' last dates of furnishing.

Furthermore, if this Court were to find that a claim of lien is deemed recorded on the date the instrument is received (but not recorded in an entry book), uncertainties with respect to priorities will continue. There is the question of how the courts will handle priority issues where multiple instruments are received on the same date for recording on the same property when only a date stamp (without a notation of the hour and minute of receipt) appears on an instrument. Since Michigan has adopted a race-notice statute such issues are sure to arise.

Whatever the possible administrative solutions to the problems associated with the Register of Deeds' offices in Wayne and other counties throughout the State may be, the application of the substantial compliance provision of the Act to the term "record" in section 111(1) is not warranted. Such issues are best addressed by the Legislature or by those parties

⁶ Appellant agrees with Amicus Curiae's position that an instrument can be located in an index after it has been formally recorded.

such as lien claimants who have the option of filing a mandamus action against the Wayne County Register of Deeds to make them keep an entry book and record claims of lien as they are received.

II. Filing documents with the court clerk is not the same as recording a claim of lien

Appellee Kitchen Suppliers, Inc. attempts to draw analogies with respect to filing documents with the court clerk for an affidavit in support of the issuance of a writ of attachment, *Beebe v Morrell*, 76 Mich 114; 42 NW 1119 (1889) and for an affidavit in support of a search warrant, *People v Madigan*, 223 Mich 86; 193 NW 806 (1923). Neither analogy is appropriate because first, the cases do not address the issue of timeliness of the filing. Second, they do not involve the recording of instruments with the register of deeds or serve the important policy function of giving notice to the public at large.

While *In the Matter of Flagstaff Foodservice Corp.*, 16 B.R. 132 (Bankr. SDNY 1981), is factually different with respect to the present case and with respect to the statutory provision, it is similar to this matter in that both the UCC filing requirement and the 90-day recording requirement clearly and unambiguously provide the requirements needed to protect a particular interest. In *Flagstaff, supra*, at 134 the bankruptcy court held that a security interest was perfected upon presentation by mail and tender of the appropriate fee based upon the express statutory language of the Uniform Commercial Code, which provided that “[p]resentation for filing of a financing statement and tender of the filing fee or acceptance of the statement...constitutes filing under this Article.” [*Id.* at 134. (Underlining added).] In this case, the Legislature chose the word “record” with respect to creating a claim of lien not “presentation” for the reasons discussed above.

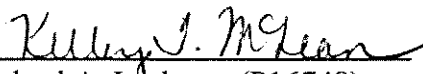
CONCLUSION AND RELIEF SOUGHT

The Legislature has determined that the right to a construction lien "shall cease to exist" if not recorded within 90 days of last furnishing materials and labor. The language of section 111(1) of the Act is clear and unambiguous. The failure of the Wayne County Register of Deeds to maintain an entry book and to record Appellees' claims of lien in such a book as required by statute is not a reason to find that the substantial compliance provision of the Construction Lien Act applies to section 111(1) or that a liberal interpretation should apply to the word "record". In any event, it is fair to say that Appellees' liens were not recorded when presented because they were not recorded in an entry book noting the date, hour, and minute of receipt together with other particulars. If there is a problem with enforcing the clear and unambiguous language of section 111(1) of the Act, as written, then that problem should be resolved by the Legislature, not this Court.

Respectfully submitted,

Michael A. Cox
Attorney General

Thomas L. Casey (P24215)
Solicitor General
Counsel of Record


Michael A. Lockman (P16748)
Kelley T. McLean (P56542)
Assistant Attorneys General
Attorneys for Appellant
3030 W. Grand Blvd., Ste. 10-200
Detroit, MI 48202
(313) 456-0040

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